

YES, THE SENATE ELEVATED PARTISAN POLITICAL GOALS OVER CONSTITUTIONAL TEXT WHEN IT REFUSED TO CONSIDER PRESIDENT OBAMA'S NOMINEE TO REPLACE JUSTICE SCALIA

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To understand the narrow scope of Seth Barrett Tillman's critique of my article,¹ *The Garland Nomination, the Senate's Duty, and the Surprising Lessons of Constitutional Text*,² the reader must understand the scale of my thesis. Therein, I analyze whether the Senate has a constitutional duty to meaningfully consider presidential nominees to the United States Supreme Court. To gain analytical traction on that problem, I identify those powers the 114th Senate secured over the appointment process when it asserted the authority to refuse consideration:

[T]he Senate . . . [expressly] claimed authority under the Appointments Clause to decline consideration of any nominee of an individual President based on factors such as (1) the Senate's perception of the importance of the appointment or (2) the political features of its timing. A Senate that claims those powers captures the authority to indefinitely halt the appointment process, to shift the appointment power to a subsequent President, and even to unilaterally reduce the size of the Court upon the emergence of a vacancy. Moreover, a Senate that claims the threshold power to decide *who* will be considered functionally usurps part of the President's nomination power itself.³

I then review the controlling constitutional text to evaluate the legitimacy of those claims.⁴ I conduct that review in conformity with traditional canons for understanding text, frequently using Justice Scalia's own definitive treatise as a guide.⁵ And, I conclude that the text of the Appointments

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¹ Seth Barrett Tillman, *On the Senate's Purported Constitutional Duty to Meaningfully Consider Presidential Nominees to the Supreme Court of the United States: A Response to Chief Judge Peter J. Eckerstrom*, 21 U. PA. J. CONST. L. 879 (2019).

² Peter J. Eckerstrom, *The Garland Nomination, the Senate's Duty, and the Surprising Lessons of Constitutional Text*, 21 U. PA. J. CONST. L. 33 (2018).

³ *Id.* at 35.

⁴ *Id.* at 40–55.

⁵ *Id.* at 38 n.13, 39 n.16, 42 n.31, 48 n.45–47, 50 n.51, 51 n.57, 52 n.61, 69 n.117.

Clause, and the purposes conveyed by that language, cannot be harmonized with the Senate's express and implicit claims of authority.⁶

I provide five reasons why the Senate's claim of authority defies the Constitution's distribution of powers between the branches:

[T]he 114th Senate's misreading of its textual authority under the Advice and Consent Clause: (1) compromises the President's exclusive power to select nominees; (2) contradicts the evident purpose of the Appointments Clause as conveyed by its text (the mandatory and prompt appointment of important governmental functionaries); (3) bypasses the Constitution's express prescription for how the size of the Court may be altered; (4) overlooks constitutional limitations on the Senate's rule-making authority; and (5) cripples one of the intended constitutional checks on the Senate's power over the appointment process.⁷

I also observe more generally that the Framers' placement of the Appointments Clause in Article II, Section 2 (rather than in Article I or, more neutrally, in Article III), coupled with the sparse and dependent language of the Advice and Consent Clause, contradicts any textual claim that the Senate was tacitly endowed with dominant authority over the appointments process.⁸ Finally, I review founding-era understandings of the Appointments Clause held by the Constitution's most prominent drafters, explicators, and opponents.⁹ That inquiry corroborates my thesis that the Appointments Clause was designed to provide the President, not the Senate, primary and dominant authority over the appointments process.

Mr. Tillman takes issue with but one of those arguments, an argument neither original to my article nor necessary to accept my thesis: I contend, *inter alia*, that the text of the Appointments Clause sets forth a three-step process for filling important government posts: nomination, Senate consideration (through advice and consent), and appointment.¹⁰ The first and third of those steps are expressly obligatory: the President "shall nominate" and "shall appoint."¹¹ For this reason, I posit that the second step—Senate consideration—must be implicitly mandatory as well.¹² That argument is anchored in the semantic meaning of the word "shall," supported by the context of that word's usage elsewhere in Article II.¹³

⁶ *Id.* at 67–68.

⁷ *Id.* at 37.

⁸ *Id.* at 37–38.

⁹ *Id.* at 58–67.

¹⁰ *Id.* at 42.

¹¹ *Id.*

¹² *Id.* at 43.

¹³ *Id.* at 45–46.

Mr. Tillman first wages a jurisprudential challenge. Tillman finds reasoning by Justice Marshall in *Marbury v. Madison* that, he maintains, contradicts the notion that the Appointments Clause creates any obligation on the President to fill vacancies.¹⁴ Although Tillman chides my thesis for overlooking such a prominent case,¹⁵ Tillman himself overlooks the plain context of Justice Marshall's reasoning. In the segments quoted by Tillman, Marshall analyzes whether a person who has been lawfully nominated and appointed by the President for a lesser governmental post, but has not received his commission from the Secretary of State, has been lawfully installed in that position.¹⁶

To address that question, Marshall compares those Article II appointment powers the President enjoys independent from congressional influence to those that the President must execute in compliance with congressional directive.¹⁷ To this end, Marshall identifies a distinction between those officials the President has the exclusive power to nominate and appoint without any congressional delegation of appointment authority (those officials specifically itemized in the Appointments Clause), and those "inferior officers" as to whom Congress maintains authority to specify the appointing entity.¹⁸ Marshall makes this distinction to evaluate whether, and under what circumstances, a President has an Article II, Section 3 duty to "commission all the officers of the United States."¹⁹

In context, then, when Marshall states that the President's power to nominate is "the sole act of the President" and "completely voluntary,"²⁰ he is addressing not whether the constitutional text obligates the President to fill the itemized important governmental posts (an issue not before the Court in *Marbury*), but rather whether the President has the exclusive power to nominate independent of any congressional role. Notably, in the next sentence, when Marshall similarly describes the President's appointment power itself as an exclusive, voluntary act, he qualifies that "it can only be performed by and with the advice and consent of the senate."²¹

To put it bluntly, Marshall does not purport to address the question relevant to my thesis: whether the semantically mandatory language of

¹⁴ Tillman, *supra* note 1, at 881–82.

¹⁵ *Id.* at 881 ("[A] judge on some multi-member appellate court—albeit, not a particularly well-known judge—albeit, not a particularly well-known court—once addressed this precise issue in a case that is no longer quite rightly remembered.").

¹⁶ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 155–56 (1803).

¹⁷ *Id.* at 156.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 155.

²¹ *Id.*

Article II, Section 2 imposes an express duty on the President, and an implied duty on the Senate, to take the actions necessary to fill important governmental vacancies. This explains why those constitutional scholars, who previously made the same point as mine, did not address Marshall's reasoning.²²

Mr. Tillman also makes a more pertinent and sophisticated argument that the meaning of the word "shall" in the Appointments Clause is unclear.²³ But he fails to rebut the most powerful evidence demonstrating the drafters' semantic intentions. As I explain, Article II, Section 2 calibrates the level of presidential discretion attached to each of the numerous executive powers itemized therein.²⁴ Thus, one must overlook the structure and context of the language immediately surrounding the Appointments Clause to contend that the Framers used "shall" casually or imprecisely therein. Indeed, elsewhere in Article II, the drafters demonstrated themselves capable of using the word "will" to denote an expectation of future action and "may" to indicate discretionary action.²⁵

Mr. Tillman's challenge to my thesis—wherein he maintains that intellectual integrity requires that I respond to his above critiques—invites a challenge to his own. Those who, like Tillman, (1) maintain that Originalism transcends other forms of constitutional and textual interpretation in assuring fidelity to the rule of law,²⁶ (2) laud Justice Scalia as the most articulate and powerful advocate of that view, and (3) recognize that Justice Scalia's replacement would determine the mode of interpretation embraced by the majority of the Supreme Court for a generation, must also answer some questions.

In refusing to allow a validly elected President to fill Justice Scalia's vacancy on the Supreme Court, did the 114th Senate make any serious effort to abide by the textualist and originalist principles of constitutional interpretation for which it had eulogized Justice Scalia?²⁷ When that Senate's leadership claimed broad authority to dominate the appointments

²² See Tillman, *supra* note 1, at 882 n.12 (identifying other scholars who have recognized the mandatory nature of the President's Article II appointment powers).

²³ *Id.* at 7–10.

²⁴ Eckerstrom, *supra* note 2, at 46.

²⁵ *Id.* at 46 & n.39.

²⁶ See J. HARVIE WILKINSON III, COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE, 40–44 (Geoffrey R. Stone ed., 2012) (describing the quest for interpretive constraints as an animating premise for originalist doctrine as articulated by Robert Bork and Justice Antonin Scalia and observing specifically that "[t]his constraining force . . . is the basis of its appeal . . .").

²⁷ The historical record suggests not. Within an hour of notice of Justice Scalia's death, Senator Mitch McConnell, the Senate Majority Leader, announced that the Senate would not allow President Obama to replace Scalia. See Eckerstrom, *supra* note 2, at 40 & n.25.

process, did it conduct any searching analysis of Article II, Section 2 to find even a scrap of express language affirmatively supporting its unprecedented assertion of power? Conversely, did the Senate consider whether that novel claim of authority could be harmonized with the express text of the Appointments Clause and the evident purposes of that text?²⁸

My thesis makes a comprehensive case from the text of Article II, reinforced by founding-era understandings of that text, that the 114th Senate violated constitutional design when it refused to consider any person nominated by President Obama to replace Justice Scalia. My thesis suggests that a Senate majority, which praised Justice Scalia for his commitment to abide by constitutional text, elevated partisan political goals over any conscientious effort to comply with the express and implicit constitutional directive found in the Appointments Clause. Given the gravity of that conclusion to a core originalist claim—that their professed theory of interpretation most effectively constrains politically motivated constructions of the law—Mr. Tillman’s one-issue response to my multi-faceted thesis is strikingly incomplete.

²⁸ This should not be a trivial question for a disciplined originalist. See Amy Coney Barrett & John Copeland Nagle, *Congressional Originalism*, 19 U. PA. J. CONST. L. 1, 3 (2016) (observing that “[t]he conventional position of modern originalists, however, is that the original public meaning of the Constitution’s text is ‘the law.’ The consequence of that position is that the original public meaning of the Constitution binds the legislators who swear to uphold it.”).

